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84-1551

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

KATHERINE D., a minor, by and through her natural parents and legal guardians, Kevin and Roberta D., Petitioner

v.

DEPARTMENT OF EDUCATION, State of Hawaii, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit Court of Appeals err in ruling--contrary to the First Circuit Court of Appeals' decision in Burlington v. Dept. of Education, 736 F.2d 773 (1st Cir. 1984), cert. granted, 53 U.S.L.W. 3417 (December 3, 1984)--that a handicapped child who wins an administrative hearing held under the Education for All Handicapped Children's Act (20 U.S.C. § 1401 et seq.) has the burden of proof in later proceedings where the state seeks to change the educational program approved in the administrative ruling?

2. Did the Ninth Circuit Court of Appeals err in ruling--contrary to the decision in Burlington and the explicit terms of 20 U.S.C. § 1415(e)(3)--that a handicapped child is not entitled, after obtaining a favorable ruling in the

District Court, to remain in a private school placement at public expense pending the outcome of the judicial proceedings?

3. Did the Ninth Circuit incorrectly decide that a state can satisfy its obligation under the EAHCA to provide a free and appropriate public education--and thus be excused from any financial responsibility for educating handicapped children--on the basis of programs which are theoretically sound but which it admittedly is unprepared to implement.

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KATHERINE D., a minor, by and through her natural parents and legal guardians, Kevin and Roberta D.,

Petitioner

v.

DEPARTMENT OF EDUCATION, State of Hawaii

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner Katherine D., by and through her natural parents and legal guardians, Kevin and Roberta D., files

this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit which affirmed in part and reversed in part the judgment of the United States District Court for the District of Hawaii in deciding Katherine D.'s rights under the Education for All Handicapped Children's Act (20 U.S.C. § 1401 et seq.).

In support of the Petition, it is respectfully shown as follows:

OPINIONS BELOW

The District Court's opinion (Appendix A, infra, at A1-A63) is reported at 531 F. Supp. 517 (D. Hawaii 1982). The opinion of the Court of Appeals (Appendix B, infra, at A64-A121), reversing the judgment of the United States District Court for the District of Hawaii is reported at 727 F.2d 809 (9th Cir. 1983). The Order of the Court of Appeals reject-

ing Katherine D.'s petition for rehearing and suggestion for rehearing en banc (Appendix C, infra, at A122) is not reported.

JURISDICTION

Petitioner seeks review of the judgment of the Court of Appeals for the Ninth Circuit, dated and entered on November 7, 1983. Her petition for rehearing and suggestion for rehearing en banc was rejected by the Court of Appeals by Order filed on November 20, 1984. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).[1/]

RELEVANT STATUTORY PROVISIONS

1. Section 1401(17) of Title 20, United States Code provides:

1/ All parties to the proceedings in the Court of Appeals are listed in the caption of this case.

> The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

2. Section 1401(18) of Title 20, United States Code, provides:

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, ele-

> mentary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

3. Section 1412 of Title 20, United States Code, provides in pertinent part:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> (1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

4. Section 1415 of Title 20, United States Code, provides:

> (a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish

and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units. . . .

. . . .

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

. . . .

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in contro-

versy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy. (Emphasis added.)

5. Section 300.342 of Title 34, Code of Federal Regulations provides:

> When individualized education programs must be in effect.
>
> (a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.
>
> (b) An individualized education program must:
>
> (1) Be in effect before special education and related services are provided to a child; and
>
> (2) Be implemented as soon as possible following the meetings under § 300.343.

6. Section 300.343 of Title 34, Code of Federal Regulations provides:

> Meetings.
>
> (a) General. Each public agency is responsible for initiating and conducting meetings for

the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

(b) Handicapped children currently served. If the public agency has determined that a handicapped child will receive special education during school year 1977-1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) Other handicapped children. For a handicapped child who is not included under paragraph (b) of this action, a meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

(d) Review. Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

STATEMENT OF THE CASE

Katherine D. was born in 1976. Since birth, she has suffered from cystic fibrosis and tracheomalacia, which causes her windpipe to be floppy instead of rigid. Beginning in 1978, and throughout the years relevant to this case, Katherine wore a tracheostomy tube, which allowed her to breathe and expel secretions from her lung through a hole in her throat. Katherine is unable to vocalize normally, but she has received speech therapy and, since 1981, has been able to speak very softly.

In the summer of 1980, Katherine was certified by the DOE as a handicapped child eligible for special education services under the Education For All Handicapped Children Act. As required by the Act, the DOE offered an Individualized Education Program ("IEP") to Katherine

prior to the beginning of the 1980-81 school year. The DOE declared that the special services that Katherine might require could not be provided at a public school. Therefore, the DOE proposed a homebound program for 1980-81 which consisted solely of in-home speech therapy and parent counseling. Katherine's parents rejected this program and initiated a due process hearing under the provisions of 20 U.S.C. § 1415(b)(2).

During the course of that proceeding Katherine continued to attend a private preschool. Her enrollment there was contingent on the presence of her mother, who was trained to assist Katherine in the event of an emergency. If her mother, or some other trained person was not available within minutes to assist Katherine in an emergency, Katherine faced a substantial risk of brain damage or death.

In October, 1980, the administrative hearing officer decided that Katherine was able to attend school and that the DOE's offer of a homebound program did not constitute a "free appropriate public education" as required by law. The DOE appealed, pursuant to 20 U.S.C. § 1415(e)(2), which gives federal jurisdiction over such appeals. Katherine counterclaimed for enforcement of the hearing officer's order, attorneys' fees and costs.

After commencement of the District Court proceedings, the DOE submitted an IEP for the 1981-82 school year to Katherine's parents. Under this IEP, the DOE proposed that Katherine attend one of its schools and receive emergency health services, when needed, from the school staff. The IEP outlined a plan to train the staff to dispense Katherine's medica-

tion, suction her lungs, and reinsert her tracheostomy tube in the event of an emergency.

It was agreed by the DOE and Katherine's parents that the school staff would be trained by Katherine's treating physician. The first two planned training sessions were conducted, as agreed, shortly after the commencement of the 1981-82 school year.

During this training session, the physician determined that the school staff was not competent to perform the required emergency health services. Therefore, he recommended that Katherine not be sent to the DOE school. The remaining training was never completed.

Shortly after the initial training session, three unions representing the DOE's employees at the school which Katherine was to attend filed grievances

protesting the plan to require them to perform emergency services for Katherine. Their grievances were unresolved at the time of the trial, which took place during the middle of the 1981-82 school year.

Katherine's parents heeded the physician's judgment and the implications of the union grievances. They refused to risk Katherine's well-being and therefore kept her in private school. The DOE refused to pay Katherine's tuition. The parties submitted their dispute over this issue to the District Court for decision.

The District Court affirmed the findings of the hearing officer as to the 1980-81 school year and held that the DOE had not made an adequate offer for a "free appropriate public education" for either 1980-81 or 1981-82. With respect to the latter academic year, the court ruled that the DOE failed to show that its personnel

were competent and willing to perform the services which undeniably were necessary to save Katherine's life in an emergency. The District Court further ordered the DOE to reimburse Katherine's parents for the cost of her private schooling during both years. The District Court also ordered the DOE to pay Katherine's attorneys' fees and costs.

The DOE appealed on all issues. The Court of Appeals affirmed in part and reversed in part. It affirmed the ruling as to the 1980-81 school year, holding that the DOE's offer of a homebound tutorial program was patently inadequate in view of Katherine's demonstrated ability to alter school when in the care of trained people. However, it reversed the district court's ruling for the following year.

In doing so, it held that the DOE was entitled to a presumption of good faith on the issue of whether its staff could and would implement the new IEP. Despite the union grievances and the physician's testimony, it held that the factual evidence proffered by Katherine was inadequate to rebut this presumption. The presumption was not recognized by the District Court and the burden of proof had been placed by the district court--without objection--on the DOE. In short, the Court of Appeals reversed because Katherine failed to meet a burden which she never knew was hers.

REASONS FOR GRANTING THE PETITION

A. The decision below conflicts with the decision of the First Circuit Court of Appeals in Burlington v. Dept. of Education, 736 F.2d 773 (1st Cir. 1984), which this court has already taken under review, with respect to allocation of the burden of proof.

In Burlington, the First Circuit faced the burden of proof issue which the Ninth Circuit decided against Katherine. Specifically, the First Circuit was asked to decide whether the parents or the school officials would have the burden of proving the adequacy/inadequacy of the proffered public school program for school years as to which no administrative proceedings had been held. The court ruled that ordinarily the burden of proof in judicial proceedings under the EAHCA would fall on the party which lost the administrative proceedings. With respect to later years, which were outside the scope of the administrative ruling, the burden would be placed on the party which lost the dispute over the initial year. That party--whether the state or the child--would have

> the burden of producing evidence and persuading

> the court of changed circumstances that render the district court's determination as to the initial year inappropriate for guiding its order of relief for subsequent years.

736 F.2d at 795.

This ruling is directly contrary to the Ninth Circuit's ruling, which burdened Katherine--despite her administrative and district court victories--with the obligation to prove that the DOE was not ready or willing to implement a suitable program for her education. The Ninth Circuit held that--even when they lose the underlying administrative and trial court proceedings--state educational agencies are entitled to a presumption--which handicapped children must produce evidence to overcome--that their plans will be implemented "competently and in good faith." 727 F.2d at 815. This presumption allocates the burdens of going forward and

persuasion on the handicapped child in a manner that is inconsistent with the First Circuit's ruling.

Having granted review to Burlington, the court should also grant review to this case, in order to be able fully to reconcile the conflicting decisions of the Circuit Courts of Apppeal on this issue of great importance to handicapped children.

B. The Ninth Circuit's decision conflicts with the decision of the First Circuit Court of Appeals in Burlington, which this Court is now reviewing, insofar as it imposes stricter limits on parents' rights to maintain handicapped children in private school at state expense.

The Ninth Circuit held that Katherine was not entitled to stay in private school at public expense during 1981-82 because the DOE offered her a suitable public educational program during that school year. In making this ruling,

the Ninth Circuit reached a result which is inconsistent with the First Circuit's Burlington decision.

The First Circuit holds that, with respect to the years covered by administrative rulings, parents of handicapped children are entitled to have the state pay for their children's schooling if they "relied on a state administrative decision in their favor" when placing the children in private school. 736 F.2d 799. When parents have paid the bill for this period, they must be reimbursed. Id. at 801. Although the Ninth Circuit used a more restrictive test with respect to Katherine's schooling during 1980-81, it reached the same result and required the DOE to pay for her private schooling because the DOE offered no suitable program for that academic year.

The decisions of the Ninth Circuit and the First Circuit are, however, irreconcilable with respect to the subsequent school year. The Ninth Circuit denied Katherine any compensation for the later year because it determined, after the fact, that the district court had erred in ruling that the DOE's proposed program was inadequate. The First Circuit would have reached the opposite result and ruled in Katherine's favor.

The First Circuit determines parents' entitlement to have a state continue to pay private school tuition

> by balancing the equities. Factors that should be taken into account include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters.

736 F.2d at 801-802. The Ninth Circuit demands that a handicapped child demon-

strate "exceptional circumstances" before he/she is entitled to reimbursement for private school expenses. See 727 F.2d at 818. See also Mountain View-Los Altos Union High School Dist. v. Sharron B.H., 709 F.2d 28 (9th Cir. 1983).

In contrast to the rule adopted by the Ninth Circuit in the instant case and Mountain View, the First Circuit's balancing test grants greater freedom to--and imposes less financial risks on--the parents of handicapped children. The First Circuit explicitly determined that this more liberal rule was supported by the intent of the Education for All Handicapped Children Act (20 U.S.C. §§ 1401 et seq.) and the intent of Congress. 736 F.2d. 800; Doe v. Brookline School Comm., 722 F.2d 910 (1983). More stringent decisions restricting parents' entitlement to reimbursement--including those relied on

by the Ninth Circuit in formulating its standards and policies for tuition reimbursement--have been explicitly rejected by the First Circuit in favor of equitable balancing. Compare Mountain View-Los Altos Union High School Dist. v. Sharron B.H., 709 F.2d 28 (9th Cir. 1983) with Burlington, 736 F.2d at 795-802 and Doe v. Brookline School Comm., 722 F.2d at 915-921.

Here, all of the equities were in favor of Katherine and her parents: They prevailed at the administrative hearing; they did not receive the new IEP until after the next school year had already begun; they were advised by the doctor designated to train the school staff that Katherine would not be given proper care in an emergency; the DOE never completed the training necessary to implement the program; and the district court ruled in

their favor. Nevertheless, over a year after the school year ended, the Ninth Circuit denied that their fears for Katherine's safety were groundless and that the DOE's program was inadequate.

Katherine lost only because the Ninth Circuit's views are different than those which prevail in the First Circuit. This Court should grant certiorari to eliminate the conflict between the Circuit Courts of Appeal by approving the decision in Burlington and overturning the Ninth Circuit's ruling against Katherine.

C. The Ninth Circuit ignored the intent of Congress and the express requirements of the EAHCA by holding that a state could meet its obligation to provide a "free and appropriate public education" without proving that its staff was willing and competent to implement the required program of related services.

The undisputed evidence--in the form of a stipulation between the parties--showed that at the time of trial in the

middle of the 1981-82 school year the DOE had not completed the staff training which was a prerequisite to Katherine's public school program. Nevertheless, the Ninth Circuit held that the DOE's offer of the program at the beginning of the school year was sufficient to deny tuition reimbursement to Katherine and her parents. This raises an important question of federal law, of concern to handicapped children throughout the country, which should be decided by this Court.

Here, the Ninth Circuit has ruled that the obligation was satisfied--for the entire academic year--by a program which the DOE was not prepared to implement even as late as the end of January, 1982, when the school year was half over. This decision means, in effect, that a program which is available in theory, but not in fact, suffices to meet a school agency's

obligation to provide all handicapped children with free appropriate public educations.

This is utterly wrong. Federal law requires that educational agencies must timely implement the programs they offer to handicapped children. See 34 C.F.R. § 300.342. Not only does federal law require that the educational program offered to handicapped children be "implemented as soon as possible following" the IEP meeting between the DOE and their parents, 34 C.F.R. § 300.342(2), it is absolutely required that each handicapped child's IEP be "in effect at the beginning of each school year." 34 C.F.R. § 300.343, comment.

As is stated in 34 C.F.R., Ch. 111, Appendix C--Notice of Interpretation,

> the term "be in effect" means that the IEP (1) has

> been developed properly . . .; (2) is regarded by both parents and agency as appropriate in terms of the child's needs, specified goals and objectives, and the service to be provided; and (3) will be implemented as written.

34 C.F.R., Ch. III, Appendix C, (3).

As regards the timing required for implementation, the official interpretation of the regulations states:

> In general, no delay is permissible. It is expected that the special education and related services set out in a child's IEP will be provided by the agency beginning immediately after the IEP is finalized.

34 C.F.R., Ch. III, Appendix C, (4). There can be no question that by offering a program which was not "regarded by <u>both</u> parents and agency as appropriate," 34 C.F.R., Ch. III, Appendix C, (3) (emphasis added), and which was not "in effect at the beginning of (the) school year," 34

C.F.R. § 300.343 comment, the DOE violated its duty under federal law to plan and then immediately implement by the beginning of the school year a viable program of special education for Katherine.

Certiorari should be granted to correct the Ninth Circuit's disregard for the requirement that educational agencies actually be able to deliver the special education and related services which are needed by handicapped children. There is nothing in the language or purpose of the EAHCA or its implementing regulations which would justify the Ninth Circuit's liberal policy. Handicapped children should not be forced to forego a suitable private school program on the promise of a public program which may never be delivered.

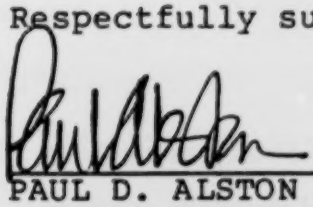
CONCLUSION

The Ninth's Circuit's partial reversal was factually and legally unwar-

ranted. Its interpretation of the DOE's obligations and Katherine's rights under the EAHCA is fundamentally inconsistent with the decisions of the First Circuit Court of Appeals in Burlington, which is now being reviewed by this Court, and in Doe v. Brookline School Comm.

This Court should either (1) grant certiorari and consider this case together with Burlington or (2) withhold action on this petition until Burlington is decided and then remand this case to the Ninth Circuit for further consideration in light of that ruling.

Respectfully submitted,



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February 14, 1985

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII
CIVIL NO. 80-0582

DEPARTMENT OF EDUCATION,
State of Hawaii,

Plaintiff,

vs.

KATHERINE D., a minor by and through her natural parents and legal guardians, Kevin and Roberta D.,

Defendants,
Counterclaimants,

and

DEPARTMENT OF EDUCATION,
State of Hawaii,

Counterclaim-
Defendant.

DECISION

This is an action by the Department of Education of the State of Hawaii for judicial review of an administrative hearing officer's decision rendered pursuant to Section 615 of the Education for All Handicapped Children Act of 1975

(hereinafter "EAHCA"), 20 U.S.C. §1415. The jurisdiction of this Court is invoked under 20 U.S.C. §1415(e)(2) and 45 C.F.R. §121a.511. Jurisdiction of this Court over the action as initially brought by the Plaintiff DOE is not disputed.

The Defendants have brought a counterclaim against the DOE. They allege that this Court has jurisdiction over the counterclaim under 28 U.S.C. §§1331 and 1343, and 20 U.S.C. §1415(e). Jurisdiction as to the counterclaim is disputed.

The standard of review by the District Court in a P.L. 91-142 (20 U.S.C. §1415(e)(2)) case, is as follows: "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is

appropriate." It therefore appears the Court has authority to formulate the relief it deems appropriate.

Katherine D. is a four-year-old handicapped child who has been found eligible for special education services under the Education for All Handicapped Children Act (20 U.S.C. §1401 et seq.). Her identified handicapping condition is that she is "other health impaired," as defined in 45 C.F.R. §121a.5. She suffers from cystic fibrosis. In late January, 1981, it was determined, by a diagnostic examination, that Katherine D. has tracheomalacia which means that the walls of her windpipe are floppy and not rigid.

Since 1978, Katherine has had a tracheostomy and worn a tracheotomy tube. Until February, 1981, the tracheotomy tube was held in place by surgical strings which were threaded through a plastic tube which she wore around her neck as a collar

necklace. Since that time, the tracheotomy tube has been held in the tracheostomy by means of a 14 karat gold chain approximately 1/4 to 1/2 inch in diameter. The tracheostomy and tracheotomy tube allow Katherine to breathe and expel secretion from her lungs.

Since Katherine has had her tracheostomy, there have been four instances in which Katherine's tracheotomy tube either was dislodged or was in danger of being dislodged. In 1978, her tracheotomy tube had to be inserted in two other instances while Katherine was hospitalized at Kapiolani-Children's Hospital. In one instance which occurred in 1978 while Dr. Arlene Meyers, her then attending physician was trying to change the size of Katherine's tracheotomy tube, Dr. Meyres [sic] encountered difficulties reinserting the tube, and Katherine was within a couple of minutes of dying. Present in

the room were Katherine's parents, a respiratory therapist, a pulmonary fellow, a nurse, and Dr. Meyers. The room in which the procedure took place contained all the equipment needed for the procedure.

Katherine is unable to vocalize normally, due to two conditions. First, her windpipe is not rigid enough to maintain its diameter and allow sufficient air to pass from her lungs through her vocal chords. The condition of her windpipe is attributable to tracheomalacia. Second, because the tracheostomy is located below her vocal chords, most of the air exhaled from the lungs leaves through the tracheostomy before it passes her vocal chords. Since February, 1981, however, Katherine has been able to speak audibly, although very softly. This would indicate that more air is capable of passing through the

length of her windpipe more readily than before.

The cystic fibrosis causes thick mucus to accumulate in her lungs and makes her susceptible to recurrent pulmonary infections. Because Katherine is not always able to cough this mucus out herself, it is necessary for it to be suctioned out two or three times a day, through her tracheotomy tube. The cystic fibrosis also causes her to be unable to absorb food normally because she lacks the necessary pancreatic enzymes as a result of that disorder. To facilitate food absorption and to ensure proper nutrition, Katherine must have a special diet, and take pancreatic enzymes and vitamins before every meal.

The only condition adversely affecting Katherine's educational performance is her speech difficulty. During the school year 1980-81, but for the potential

danger to Katherine in the event that her tracheotomy tube was dislodged, Katherine could have been educated in a regular classroom and received itinerant speech therapy.

During the school year 1980-81, Katherine attended St. Philomena's Child Care Center, a parochial child care facility and kindergarten operated under the auspices of St. Philomena's Catholic Church, and licensed by the Department of Social Services and Housing and the DOE, respectively. She received the same preschool program as is offered to all children attending her class. She received charitable speech therapy at home through the California-Hawaii Elks Major Project since December, 1979. She continues to receive this speech therapy presently. During the 1980-81 academic year, Katherine D. did well, academically and socially, at St. Philomena's.

Katherine began attending St. Philomena's as a student in the summer of 1979. Roberta D., Katherine's mother, is employed as a teacher at St. Philomena's; her employment has been concurrent with Katherine's attendance. While Katherine is in attendance at St. Philomena's, her mother administers her medication and does any suctioning which might be necessary during the school day. No person other than her mother is responsible to reinsert Katherine's tracheotomy tube should it become dislodged while she is at school. Katherine D. qualifies for enrollment in St. Philomena's kindergarten class for the school year 1981-82, but that enrollment is contingent upon her mother remaining on the school's staff.

Katherin'e [sic] tuition at St. Philomena's for the school year 1980-81 amounted to $1,200 or $120 per month during the academic year. In addition,

Katherine's family incurred miscellaneous school expenses (for books and registration and related matters) of $135. For 1981-82, the tuition is $650 and the related costs are estimated at $130. Katherine's parents wish to have Katherine educated in a regular education class in a public school, with itinerant special education speech and language services provided as well. They will, however, only allow Katherine to attend public school if a trained person or persons is available at school to respond to her health needs, i.e., to suction excess mucus from her lungs, if necessary; to administer medication before she eats lunch; and to reinsert her tracheotomy tube should it become dislodged. An air-conditioned vehicle is not necessary for transporting Katherine to and from school.

In the opinion of Katherine D.'s treating physicians, the emergency care available to Katherine from her mother while both of them are at St. Philomena's was and is adequate for Katherine's safety. When Katherine is at St. Philomena's, her mother is on the campus, usually in another classroom. They are within two minutes apart throughout the school day. The training that Mrs. Dorr [sic] has had to enable her to handle Katherine's medical emergencies was provided to her by the staff at Kapiolani-Children's Hospital, while Katherine D. was a patient there recovering from her tracheotomy operation.

In order for Katherine to develop her speech and vocabulary normally, she needs to socialize with other children. Isolation in a homebound program of instruction would hamper Katherine's social and educational development.

Participation in a school program helps Katherine to benefit from her speech therapy. On May 13, 1980, Mr. and Mrs. Dorr requested a comprehensive evaluation for Katherine to determine if she was eligible for educational programs in public schools. At that time, Mrs. Dorr explained to the Department of Education that Katherine had a tracheostomy and requires someone who is trained to replace the tube should it become dislodged at all times.

In the summer of 1980, the DOE conducted a comprehensive evaluation on Katherine. This evaluation was required by the Education for All Handicapped Children's Act, 20 U.S.C. §1212(5)(c). In August, 1980, the DOE agreed that Katherine was entitled to special education and related services. Shortly thereafter, the DOE offered an individualized educational program (hereinafter "IEP") to

Katherine. Initially, the DOE offered an educational placement at Jefferson Orthopedic School, but subsequently withdrew the offer. The DOE then offered Katherine a homebound program consisting of 1-1/2 (one and one-half) hours of speech therapy and 40 (forty) minutes of parent counseling per week.

The DOE's initial offer for placement at Jefferson Orthopedic School was withdrawn on the basis of a recommendation made to the DOE by Allan Oglesby, M.D., then the Administrator of the Family Health Division, Department of Education, State of Hawaii, and responsible for the School Health Program Branch which provides health services for the DOE's regular and special education programs. In his opinion, the facilities, procedures and personnel available in any of the public school could not provide the kind of emergency care Katherine D. would

require should her trachectomy tube become dislodged while she was in attendance. To assure Katherine D.'s safety, Dr. Ogleby [sic] recommended that Katherine D. not be placed in public school. It was then his opinion, formulated from information provided him, that Katherine D. required an educational setting which included personnel, equipment, and medical expertise of the kind available in a hospital emergency care facility. In his opinion, the DOE was not capable of emulating such a setting. Dr. Oglesby has never examined Katherine but did see her at the October, 1980 administrative hearing.

At the time he testified in the administrative proceedings, Dr. Oglesby thought that Katherine was in a life-threatening situation whenever she was outside the hospital. Based upon what he presently knows of Katherine's condition, Dr. Oglesby believes that the program

planned by the DOE for 1981-82 at Moanalua School is reasonable, safe, and proper.

In recommending against placement in the public schools, Dr. Oglesby did not consider the suitability of placement at St. Philomena's. Dr. Oglesby's recommendation was based upon his review and understanding of Katherine D.'s medical records and information provided him by Arlene Meyers, M.D., who at the time was Katherine D.'s attending physician at Kapiolani-Children's Pediatric Pulmonary Clinic.

At the time he made his recommendation, Dr. Oglesby was not aware that Katherine D.'s tube had been dislodged while she was at home, or that her parents were able to reinsert the tube without any adverse effects to her. In making his recommendation to the DOE, Dr. Oglesby did not consider whether Katherine could attend St. Philomena's. He thought

private school placement was unrelated to his responsibility, as head of the School Health Services Program, to assure her safety in a public school. In Dr. Oglesby's opinion, Kevin and Roberta D., as parents, were free to evaluate the situation at St. Philomena's for themselves and make a determination that Mrs. Dorr's presence there was sufficient to assure them of Katherine's safety.

The Educational Placement section of the DOE's Program Standards and Guidelines for Special Education and Special Services, Programs and Services for the Orthopedically Handicapped and Other Health Impaired provides in part, that students eligible for homebound instruction are those

> . . . who are required to spend an extended period of time (twenty days or more) at home or in a hospital setting due to a physical impairment or illness. . . . The stu-

> dent is expected to be under medical care and should be certified as eligible for consideration for this program by a licensed physician. . . .
>
> . . .
>
> Hospitalized and homebound care should be considered to be among the least advantageous educational arrangements, to be utilized only when a more normalized process of education is unsuitable for a student who has severe health restrictions.

The Educational Placement section also provides the following with respect to nonpublic school services:

> Nonpublic School Services. Consideration should be given to nonpublic school placements only when adequate educational facilities or programs are not yet available in the public educational system. Advantages which may accrue to the student placed in such a setting are the availability of medical care, provisions for special treatment (such as swimming pools

> and recreational programs) programs for children of prior-to-school age or the location of such a facility which would enable a student to reside in his or her own home. The utilization of any non-public services should be continually evaluated to ascertain whether or not the student placement should be reconsidered.

The Eligibility section of the DOE's Home-Hospital Instruction Guide provides in part:

> A child is eligible for home-hospital instruction if medical evidence shows that the child is physically unable to attend regular school. Eligibility is determined on the basis of a medical report from the attending physician that such is the case. . . .

The Referral section of the DOE's Home-Hospital Instruction Guide provides in part:

> Referrals for service may come from any one of various services, with most of the applications

made by schools. Other sources include private physicians, hospitals, social work agencies, and mental health clinics.

All applications must be accompanied by a medical form or letter signed by the attending physician recommending home-hospital instruction. A new medical certification statement and recommendations are necessary at the beginning of the new school year even for the child who has been in the program the preceding year.

Health Services in the public schools are provided by the Department of Health. Such services include first aid and emergency care, preventive health care, health appraisals and follow-ups, and health room facilities. The services which, under Hawaii law, can only be performed by a licensed nurse are provided by school health complex nurses. All other health services are performed by school heath aides. Except in two instances

wherein a school health nurse is permanently assigned to one school, a school health nurse circulates within a school health complex consisting of six to ten schools in a particular geographical area. At least one school health aide is assigned to each school.

a) The school health nurses presently employed by the Department of Health are licensed registered nurses. Most of them are public health nurses who have a particular interest in working in the school setting.

b) Each school health aide is required to have a current First Aid Certificate. Although 50 percent of the school health aides have voluntarily taken Cardio Pulmonary Resuscitation ("CPR") courses, it is not a prerequisite for the position. The majority of the school health aides

are young mothers who have taken the job because the work schedule corresponds to that of their children's school schedule.

c) School health aides are expected to administer necessary first aid care for minor injuries or illnesses which students receive or experience while attending school in accordance with the Health Room First Aid Chart, and to administer medication to the extent alllowed.

d) An emergency card for each student in attendance at school is on file in the school's health room. The cards of students with ailments or health conditions which are known to require a particular response, specify the appropriate kind of care and action which is to be taken in an emergency.

Shortly after the DOE's offer was made, Kevin and Roberta D. rejected it and initiated a due process administrative hearing, pursuant to DOE Rule 49.

The administrative hearing was conducted on October 2 and 6, 1980 by a hearing officer. The hearing officer ruled in the parents' favor, holding that the DOE failed to provide Katherine with a free appropriate public education when it offered to provide home instruction during the school year 1980-81.

The decision rendered by the administrative hearing officer requires the DOE to pay Katherine's tuition at St. Philomena's Child Care Center for the school year 1980-81. The hearing officer found that the DOE's officer of home instruction, was not a "free appropriate public education" in the "least restrictive environment." The hearing officer further found that the non-availability of

a public preschool program capable of responding to Katherine's health needs did not absolve the DOE of its responsibility to provide her with a preschool program under the EAHCA.

At an IEP conference held September 1, 1981, the DOE offered Kevin and Roberta D. a non-special education kindergarten program with itinerant speech therapy to be provided during the school day for two hours each week for Katherine during the 1981-1982 school year. Placement is to be in a regular kindergarten classroom at Moanalua Elementary School, Katherine's home school.

At that conference, the DOE generally outlined emergency procedures which would be used to respond to any accidental disloding [sic] of Katherine's tracheotomy tube during her attendance at Moanalua, as well as to provide any suctioning which might be necessary during the school day.

Provisions which would be made to assure that Katherine received her medication were also described. The nature of the transportation services which would be included as a related service in Katherine's IEP were also related at the conference. Details as to the emergency procedures are yet to be worked out with Tripler Medical Center or another appropriate emergency medical care facility.

Kevin D. indicated that they would provide for Katherine's transportation to and from school. He also indicated that Katherine would not require regular suctioning during the school day.

At the close of that IEP conference, Kevin D. requested that he be able to confer with Roberta D. about the program and placement which the DOE offered. The IEP has not yet been returned to Moanalua Elementary School. Kevin and Robert D. have, however, indicated their

continued interest in having Katherine enter Moanalua Elementary School no later than January, 1982.

On September ° 1981, school personnel who could reasonably be expected to be in the vicinity of Katherine during the school day and other interested school personnel, attended the first of two training sessions organized by the DOE to acquaint them with Katherine's disability and instruct them in how to appropriately respond to any accidental dislodgment of her tracheotomy tube. The session was conducted by Dr. Michael Light, Katherine's present treating physician.

Accordingly, to Dr. Light's testimony, he found the teachers and school administrators less than enthusiastic about the plan. In fact, there were expressions of displeasure with the plan and the general atmosphere was one of uncooperativeness. Indeed, the adverse

sentiment toward this plan surfaced a few days later by the filing of a grievance by the administrators of the school and three teachers on behalf of the Classroom Teachers Association charging violation of their contracts of employment by being required to perform duties of a medical nature outside the scope of their contractual duties. These grievance petitions are now subject to arbitration and undecided.

At first glance, it may appear that the attitude of the school personnel was one of callousness and "lack of feeling" but when you explore the circumstances, it becomes clear that they responded to the plan with fear and trepidation. Fear that they could not perform the medical procedure correctly and that the child might die at their hands; or fear of the personal aspects of the procedure itself; and/or the fear of being sued

if something untoward occurred during the procedure. These are genuine and legitimate fears and understandably so. Therefore, I cannot fault the school personnel for objecting to being asked to perform such medical procedures.

In any event, the attitude of the school's personnel toward the plan made it completely unworkable and ineffectual. A plan ceases to be a plan when it becomes ineffectual. Put in another way, the plan self-destructed with the filing of the grievance by the school administrators and teachers involved.

Plaintiff's [sic] argue to the contrary by stating to this Court that they believe it will win the arbitration fight. I believe they are overly optimistic. It seems common sense would dictate they cannot force duties upon an employee beyond those designated in their contract, especially if they are duties of

a medical or quasi-medical nature. Nevertheless, I must consider the facts as they now exist, not what they might be with the happening of prospective occurrences.

Now, to bring the issues into sharp focus, was the decision of the impartial administrative hearing officer regarding the DOE to pay Katherine D.'s tuition at St. Philomena's Child Care Center for the school year 1980-1981 correct?

The DOA [sic] contended at the hearing, and they now contend here, that DOA's [sic] responsibilities under the law were fully met when it offered Katherine D. and her parents a program consisting of one and one-half (1-1/2) hours of speech therapy and forty (40) minutes of parent counseling in a home environment for the school year 1980-1981.

The DOA [sic] further contended, as they now contend, that the parents of

Katherine D. voluntarily placed their child in a private pre-school after a free public education had been offered and thusly the parents should be financially responsible for her tuition payments there.

The impartial hearing officer rejected these contentions and I also reject them here. The State plan for the education of pre-school handicapped children of July, 1980, states:

> By September, 1980, the Department will provide a free appropriate public education for pre-school handicapped children ages 3 and 4 years. (Rule 49, DOA [sic] Rules)
>
> DOA [sic] must provide as follows:
>
> If State law or a court order requires the State to provide education for handicapped children in any disability category in any of these age groups, the State must make free appropriate public education available to all handicapped children of the same age

> who have that disability. (P.L.-142, 20 U.S.C., Sec. 1401)

The State of Hawaii has therefore declared its intent to educate this age group no later than September, 1980. That intention was not so implemented in that even as of this date it does not have public pre-schools available.

The parents of Katherine D., pursuant to State law, and well within the scope of DOA's [sic] announced intent, requested an appropriate program for her. The evidence at the administrative hearing shows that the Central School District recognized their responsibility under the law and at least made some efforts to arrange for Katherine's admission into the Jefferson School program. This was unsuccessful and then the DOA [sic] announced the home instruction program.

Apparently, since the law's intent had not been met and no school was

available, DOA [sic] felt that to offer a home instruction program was the best they could do under the circumstances. Eventually they sweetened the offer with an offer of an IEP speech program. A speech program is necessary but the one suggested was not current to Katherine's needs.

Federal regulations promulgated to implement the EAHCA with respect to the concept of where such a child should receive its education, prescribes as follows:

> . . . to the maximum extent appropriate, handicapped children, including in public or private institutions or other care facilities, are educated with children who are not handicapped and that special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature of severity of the handicap is such that education in regular classes with the use of supplemental aids and services cannot be

achieved satisfactorily. (45 C.F.R. Sec. 121a.550(b)).

And:

Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs. (45 C.F.R. See 121a.552(c) and (d)).

And further:

Each State educational agency shall carry out activities to insure that teachers and administrators in all public agencies are provided with technical assistance and training necessary to assist them in implementing the requirement that the handicapped child is educated in the least restrictive environment. (45 C.F.R. Sec. 121a.555).

Clearly, the home treatment program offered by the DOE in this case does not satisfy the concept of the "least restrictive environment" prescribed by the federal regulations.

EACHA [sic] requires the DOE to provide "special education" and "related services" to all "handicapped children." There is no dispute that Katherine D. is handicapped within the meaning of the EACHA [sic] (20 U.S. §1401; 45 C.F.R. §121a.54). Nor is there any question that she is entitled to special education in the form of speech therapy (20 U.S.C. §1401(16); 45 C.F.R. §121a.14). Rather, the question is (1) whether Katherine D. is entitled to have the DOE access to someone who can assist her in the event that her tracheostomy is dislodged, and, if not, (2) whether the DOE must pay for a private school placement when such assistance is available at no cost at a private

school and Katherine D. can then avoid the confining and adverse impact of a home tutoring program.

As to the first question, the answer is that if the assistance she needs falls within the EACHA [sic] definition of "related services" (20 U.S.C. §1401 (17); 45 C.F.R. §121a.13), then it must be provided to her. The answer to the second question turns upon the DOE'S duty to see that all handicapped children are educated in the least restrictive environment appropriate for them. Katherine D. contends it is her private preschool where she has gone since 1979. The DOE contends it is her home.

The types of EACHA [sic]-mandated related services which are involved here include those "supportive services"--specifically including school health services--required to assist Katherine D. to benefit from her program of special educa-

tion. The state is required to educate Katherine D., to the maximum extent appropriate, with other children who are not handicapped. (45 C.F.R. §121a.550(b)(1)). Further,

> [placement in] special classes, separate schooling or other removal from the regular educational environment [is permitted to occur] only when the nature and severity of the handicap is such that education in regular classes with supplementary aids and services cannot be achieved satisfactorily. (45 C.F.R. §121a.550(b)(2)). (emphasis added)

Katherne [sic] D.'s contention, with which I agree, is that with appropriate supportive services in the form of trained persons to whom Katherine D. has immediate access (while going to and from school and at school) who can help her with the tracheostomy in the event of an emergency, she can attend a school instead of being confined to home instruction.

The evidence shows that this service can be provided by a nurse or other trained person who need not be a physician. There was no evidence to the contrary. Therefore, this help is within the definition of related services (e.g., because it is a school health service) or is, in any event, not the type of medical assistance which is excluded from the definition of "related services."

The evidence shows (1) that but for the possibility of physically harmful problems with her tracheostomy Katherne [sic] D. should be in regular school; (2) that the aid Katherine D. needs can be--and for some years has been--provided by trained lay people; (3) that the necessary skills can be learned at no cost in a matter of hours; and (4) that if a trained person is at hand, Katherine can attend school--as she did last year and the year before--without any serious risk to her

well-being. On these bases, Katherine D. is entitled to transportation and a school-based education with special attendants at DOE expense. (Tatro v. State of Texas, 625 F.2d 557 (1980).

The evidence is that replacing the tracheostomy tube is simple to learn and not complicated. In an emergency, Katherine D. may need help during school. She must, in any event, always be assured that qualified help is close at hand; but if help is there, she can go to school. At St. Philomena's School, this help was always available.

Katherine D. is entitled to have the DOE pay her tuition at St. Philomena's School. The evidence shows that Katherine D. can attend that school because her mother is there and can give this supplementary aid--even if it is not a related service under the EACHA [sic]--at no expense to the DOE. This being so, place-

ment at St. Philomena's, together with DOE--provided itinerant speech therapy is the least restrictive environment appropriate for Katherine. Anything more restrictive is unnecessary given the unique opportunity available at St. Philomena's.

Arguments that because 45 C.F.R. §121a.552(d) requires that "consideration is given to any potential harmful effect on the child" in selecting the least restrictive alternative, Katherine D. must be confined to her home is not persuasive. Katherine's mother has to work to help support the family and thus she cannot always be home to attend to Katherine. Second, at home, Katherine D. will get no better attention than she has at St. Philomena's and she will lose the valuable educational benefit of a structured preschool program and contact with other young children in that setting.

Finally, home tutoring provides none of the nonacademic related services--mandated by the EACHA [sic]--which all young children need for healthy intellectual and emotional growth. In any event, all of the DOE's concerns about Katherine D.'s safety can be met with better service and that is just what the EACHA [sic] requires. Once the quality of the health services provided at school (be it a DOE facility or St. Philomena's) equal that to be found at home, Katherine is entitled to go to school.

The focus of Section 504 is slightly different from that of the EACHA [sic]. The EACHA [sic] enumerates certain specific handicapping conditions and requires that students with those conditions receive free appropriate public educations which (1) meet the state educational standards and (2) are individually planned in the manner required by the

regulations (45 C.F.R. §121a.340-49). No specific mention is made of a requirement that the services be comparable to those provided to non-handicapped children.

The Rehabilitation Act and its implementing regulations prohibits discrimination by agencies which receive federal aid against anyone with "a physical or mental impairment" that substantially limits "one or more major life activities" (45 C.F.R. §84.2(j)). The law specifically and unequivocally requires that educational agencies provide free education and

> related aids or services that are . . . designed to meet the individual educational need of handicapped persons as adequately as the needs of non-handicapped persons are met . . . (45 C.F.R. §84.33(b)(i)).

Further, the DOE is specifically required to:

> educate or . . . provide [at its own expense] for the education of each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. 45 C.F.R. §84.34(a) (emphasis added)

In addition, the DOE:

> shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with supplementary aids and services cannot be achieved satisfactorily. (45 C.F.R. §84.34(a)) (emphasis added).

The DOE must offer a free and appropriate education that meets these mainstreaming requirements, and if the parents of the handicapped child still choose to place the person in a private school, then the DOE is excused from having to pay for education in the private school. (45

C.F.R. §84.33(c)(4)). Conversely, then, if those requirements are not met, the placement is at DOE expense.

DOE has not demonstrated that Katherine D. cannot be satisfactorily main-streamed with the use of supplementary aids and services. Then Katherine D. is entitled either to education and services in a DOE facility or to tuition and services at St. Philomenas School. There is no question that Katherine D. needs to have quick access to a trained person who can help her in the event of an emergency problem with her tracheostomy. She also needs periodic access to a trained person who can administer her medication and use specialized equipment to suction excess mucus from her system. The latter services do not present any problem; a nurse will provide that care as and when Katherine needs it.

The former is a problem. The DOE contends that because of the uncertainty as to whether the present school health staff (a) is competent and (b) would always be available, Katherine D. is not entitled to attend school. Instead, she is entitled only to a few minutes of speech therapy at home each week. This position is untenable.

Under §504, the DOE is not required to provide services to Katherine if her handicap will prevent her from ever realizing the principal benefits of the educational program. Southeastern Community College v. Davis, 442 U.S. 397 (1979). However, if the service will enable Katherine to attend and to participate meaningfully, then it must be provided regardless of its uniqueness. Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980), cert. granted, ____ U.S. ____, 101 S. Ct. 352 (1980).

Katherine D. needs service from someone in the event her tracheostomy is dislodged. With that service, she can attend school and perform well. The individualized attention Katherine needs is functionally no different from the personalized attention afforded in Camenisch or Tatro, supra.

The DOE argues that the burden of providing this service to Katherine is more than it can be required to bear under §504. As explained in Tatro, the Supreme Court in Davis, supra,

> §504 does not require the provision of services that would impose "undue financial and administration burdens upon the recipient . . . 99 S. Ct. at 2370." Thus, for example, §504 may not require the school district to provide a very expensive procedure like kidney dialysis during the school day. 625 F. 2d 557, 565 n. 19.

If Davis is correct, the DOE is still not excused from doing more than giving Katherine some home-based speech therapy. Under §84.34, the range of alternatives considered by the DOE must include private school placement. In this case, there is such a placement where the supplementary services can be provided at no cost beyond the basic tuition expense of $1,200 per year.

There remains only one other question in this case and that is whether this Court may award tuition reimbursement and attorney's fees and costs in this case.

The EACHA [sic] (20 U.S.C. §1415(e)(2) provides that this Court, based upon a preponderance of the evidence, is to "grant such relief as the Court determines is appropriate." This may include a claim for damages. Boxall v. Sequola Union High Sch. Dist., 464 F. Supp. 1104 (N.D. Cal. 1979).

Section 504 of The Rehabilitation Act (29 U.S.C. §794) likewise provides a private cause of action to redress or prevent discrimination in federally assisted programs. See, e.g., Won v. Clark, Civ. No. 79-0570, Memorandum Decision (D. Haw. 11/10/80); Boxall v. Sequola Union High Sch. Dist., supra, and Patton v. Dumpson, 48 L.W. 2523 _____ F. Supp. _____ (S.D.N.Y. 1980)

In Won, Judge Kashiwa was asked to decide whether these statutes authorized damages for injuries unrelated to any appeal of an administrative ruling. He expressed skepticism as to whether either the EACHA [sic] or the Rehabilitation Act of 1973 permitted a damage claim, as opposed to a claim for injunctive relief (Memorandum Decision at 7-10). However, he expressly reserved ruling on both issues because in that case the

claims were, he found, maintainable under 42 U.S.C. §1983.

This Court need not step in where Judge Kashiwa left off and decide in this case whether damage actions are generally permissible under either or both acts. This case does not present that issue, as Katherine D. seeks only an order compelling compliance with the adminsitrative [sic] order. Unlike the plaintiff in Won, she does not seek compensatory damages for the DOE's longstanding neglect of her rights under those laws.

Rather, Katherine D. seeks only to have this Court affirm the administrative decision insofar as it required the DOE to pay Defendant's $1,200 tuition for 1980-81. The DOE says this relief is barred by the Eleventh Amendment. It does not argue that this relief is not otherwise available under both acts. Given that the administrative hearing was

commenced to obtain that sum, Katherine D. contends that an order requiring compliance is clearly part of the relief authorized by the EACHA [sic]. If it were not, then this Court could give her no relief at all. Instead, she would be forced to go to state court and start a new action for her money.

This, surely, is not what Congress intended by its plan to vest this Court through the EACHA [sic] with authority to give "all appropriate relief" in these cases. Sen. Conf. Rep. No. 94-455, 1975 U.S. Code Cong. & Admin. News 1480, 1503 (emphasis added). The statute and the regulations implementing the EACHA [sic] bear this out.

The statute provides that handicapped children are entitled to procedural safeguards with respect to whether the state is providing a "free appropriate

public education." In the same vein, the regulations provide that:

> Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and question of financial responsibility, are subject to the due process procedures [under the Act]. 45 C.F.R. §121a.403(b).

These due process procedures include judicial review. Clearly then, by this language, the appropriate relief here would include an order compelling compliance with the administrative ruling requiring the DOE to pay Katherine D.'s tuition. If questions of financial responsiblity are properly the subject of the hearing, and if the hearing decision can be appealed and all appropriate relief obtained, then, manifestly, orders can be entered to compel the state to accept financial responsibility.

Nor would it be consistent with the purposes underlying §504 of the Rehabilitation Act of 1973 to force Katherine D. to go to state court to obtain her tuition reimbursement. Under 29 U.S.C. §794(a), the relief available under the Rehabilitation Act of 1973 includes all of the types permitted under Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000(d) et seq.). This includes awards of back pay incidental to reinstatement orders. McLaurin v. Columbia Muni. Separate Sch. Dist. 420 F. Supp. 949 (D. Miss. 1976). An award of back pay is, obviously, closely analogous to an award of back tuition which, as here, would be ancillary to an order compelling compliance with an order requiring future compliance.

Moreover, insofar as the limited type of relief sought here is concerned, under both the EACHA and the Rehabilita-

tion Act of 1973, the state's claim of Eleventh Amendment immunity is without merit. When Congress acts pursuant to its powers under Section 5 of the Fourteenth Amendment, it can unquestionably supersede the immunity afforded by the Eleventh Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). A state may also waive its immunity under that provision even in the absence of congressional compulsion. Parden v. Terminal Railway Co., 377 U.S. 184, 186 (1964). The question whether the immunity has been (1) abrogated by Congress or (2) waived by the State depends upon an analysis of the State's actions and upon a close review of the legislative history of the two statutes. Katherine D. prevails on both arguments.

The state waived immunity in this case by coming voluntarily into this Court in tne face of the congressional grant of authority to provide all appropriate

relief and by its use of the appeal proceedings in this Court when, under 20 U.S.C. §1415, the state courts also had jurisdiction.

The DOE should not be permitted to choose between two forums and then to contend that its choice forecloses the Defendant from obtaining relief which she would have been entitled to claim in the other court. When a state voluntarily appears in federal court as a suitor, it is deemed to have laid aside its immunity on all defensive matters properly brought before the Court relating to that claim and event. Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 459 F. Supp. 507 (D. Fla. 1978), aff'd. 621 F. 2d 1340 (5th Cir. 1980); Burgess v. M/V Tamano, 382 F. Supp. 351 (D. Mo. 1974). The DOE is trying to avert compliance with the administrative ruling. By doing so, it has abandoned its

immunity to any claim that will provide a defense to that claim or otherwise defeating the state's recovery. Absent some other justification, a claim for affirmative relief is not permitted. Burgess, supra, 382 F. Supp. at 356. Katherine D. does not seek money damages unrelated to enforcement of the hearing decision, she seeks only the beneficial consequences which would flow from an order affirming and prohibiting evasion of the administrative decision.

Even if there were no waiver, then this Court should nevertheless find it can enter an order directing compliance with the administrative ruling, including payment of the tuition for 1980-81 because Congress abrogated the DOE's immunity (at least to the limited extent of authorizing enforcement of administrative rulings) when it adopted the EACHA [sic] and the Rehabilitation Act of 1973.

For purposes of the case at bar, Fitzpatrick v. Bitzer, supra, requires a close examination of the legislative history underlying the enactment of the EACHA [sic] and the Rehabilitation Act in order to determine the intent of Congress. Insofar as section 504 is concerned, Congress specifically provided that, like section 601 of the Civil Rights Act of 1964 (the statute upon which Congress modeled section 504), section 504 would: "permit a judicial remedy through a private action." 120 Cong. Rec. 20534 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 6373, 6391. In addition to authorizing enforcement by private citizens, Congress also recognized that section 504 would serve to effectuate the equal opportunity for disabled citizens to a wide range of governmental services and programs from which they had been previ-

ously excluded. On this point, Congress stated that:

> The section [504] therefore constitutes the establishment of a broad governmental policy that programs receiving federal financial assistance shall be operated without discrimination on the basis of handicap.
>
> . . .
>
> Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs. Examples of handicapped individuals who may suffer discrimination in the receipt of Federally-assisted services but who may have been unintentionally excluded from the protection of section 504 by the references to enhanced employability in section 7(g) are as follows: physically or mentally handicapped children who

> may be denied admission to Federally-supported school systems on the basis of their handicap; handicapped persons who may be denied admission to Federally-assisted nursing homes on the basis of their handicap; those persons whose handicap is so severe that employment is not feasible but who may be denied the benefits of a wide range of Federal programs; and those persons whose vocational rehabilitation is complete but who may nevertheless be discriminated against in certain Federally-assisted activities.

The legislative history of Pub. L. No. 94-142 and section 504 leave no doubt that these laws were enacted pursuant to Congress' power under the 5th clause of the Fourteenth Amendment to enact "appropriate legislation" to enforce the substantive provisions of the Fourteenth Amendment (Senate Report 1 S.B. 6). Congress' frequent and specific references to the need to assure

handicapped children an equal educational opportunity and to guarantee them adequate procedural safeguards is precisely the specific legislative intent to effectuate the equal protection rights guaranteed by the Fourteenth Amendment which Fitzpatrick, and later Hutto v. Finney, 437 U.S. 678 (1978) recognized.

That the Congress fully recognized the potential liability of state educational agencies under the EACHA [sic] is reflected in its efforts at "strength[ening]" and "clarify[ing]" the procedural protection of handicapped children so that a parent or guardian of a handicapped child could sue in federal court without regard to an amount in controversy to challenge any state educational decision. See S. Con. Rep. No. 94-555, 1975, U.S. Code Cong. & Ad. News 1480, 1503. Since Congress undoubtedly knew that some handicapped children

were placed in private schools and that there would be controversies about the states' reimbursement to parents for that schooling, Congress' enactment of the subject matter jurisdiction section of Pub. L. No. 94-142 shows that it rejected the notion that local or state agencies could hide behind the Eleventh Amendment.

To restrict the federal court's power to enforce §504 and Pub. L. 94-142 by limiting its reach in cases involving state-run federally assisted programs would plainly hamper the enforcement of those laws and their viability as effective tools against discrimination.

In Won, supra, Judge Kashiwa observed that, at a minimum, the EACHA [sic] authorizes this Court to "frame an appropriate educational program" (Id. at 10). Here, that framework is supplied by the administrative order.

Finally, Judge Kashiwa observed that in Won there was no claim that the state had waived its immunity. Here, in contrast, there is evidence of waiver and the relief sought is only that necessary to effectuate the administrative decision. If Congress intended this Court to do anything in these cases, it was to fully enforce correct administrative rulings.

The only Court to consider this question has unqualifiedly approved this analysis. In Monahan v. State of Nebraska, 491 F. Supp. 1074 (D. Neb. 1980), aff'd. ____ F.2d ____, 3 E.H.L.R. 552:380 (8th Cir. 1981) the court distinguished between damages for emotional injury and future wage loss, on one hand, and awards of tuition for school expenses incurred between the start of the administrative proceedings and final resolution of the litigation, on the other. The

former was viewed skeptically. The latter, however, was specifically approved as being appropriate and allowable in actions under the EACHA [sic]. 491 U.S. at 1094.

In substantial part, the court held that this limited damage remedy was warranted because Congress had foreclosed the court from giving any interim equitable relief which would change the status quo as it existed prior to commencement of the administrative proceedings. 491 F. Supp. at 1088-94. Given that the absence of equitable relief would, in some instances (e.g., Monahan and here), leave the burden of financing a private school placement on the parents pendente lite, even though such a placement was in fact the state's responsibility, clearly an award of tuition is an essential part of the appropriate relief. (Id.)

Section 1983 provides a cause of action against state officials who violate federal statutory rights, including those arising under the Rehabilitation Act and the EACHA [sic]. See Won, supra, at 10-11. Persons who successfully make claims under §1983 are entitled to be awarded attorney's fees and costs under 42 U.S.C. §1988. This includes fees for work done at the administrative level (Cf. New York Gaslight Club v. Carey, ____ U.S. ____ (1980) [Claimant in Title VII administrative proceeding can recover for fees spent in that proceeding and can bring suit solely to recover such fees. The operative language of §1988 is identical to that of Title VII and Congress' stated goals are virtually identical]) as well as that done in connection with litigation.

These fees, although nominally awardable only against individual state

ɔfficials are collectible from the state ɪreasury. See Finney v. Hutto, 437 U.S. ɜ78 (1978). The EACHA [sic] contains no ɜeparate fee provision; in such cases, the ɟees are awardable under §1988 (See, e.g., ʟee v. Clark, Civ. No. 80-0418, Memorandum ɒpinion (D. Haw. April 30, 1980).

Likewise, persons who success-ɟully pursue claims under §504 are ɛntitled to recover their fees and costs ɟor administrative (See Watson v. Veterans ʌdministration, 88 F.R.D. 267 (C.D. Cal. ɔ980)), as well as judicial proceedings. ɥhe Rehabilitation Act, however, has its ɯwn specific fee provision. 29 U.S.C. ɔ794a(e). The fees awardable under §504 ɑan be assessed without regard to the ʌleventh Amendment immunity against the ɪtate itself. By its terms, 29 U.S.C. ɔ794(a)(2) applies to "any action or ɪroceeding" under §504. Given that ɔongress surely knew that the states were

among the potential defendants, and given the Fourteenth Amendment foundation of §504, here, as in the case of §1988, Congress must have intended to impose fees awards upon state defendants.

The fees awardable under §1988--once a suable nominal defendant is joined--may also be granted without regard to such immunity. The Supreme Court expressly so held in Hutto, supra.

Under both statutes, fees should be awarded as a matter of course and should be denied only if there are special circumstances that would make such an award unjust. Here, there are no such circumstances and Defendants are entitled to attorney's fees and costs.

By reason of the foregoing:

(1) The administrative hearing officer's decision is hereby affirmed;

(2) The Defendants are hereby awarded reimbursements for tuition paid

for Katherine D. at St. Philomena's School; and

(3) The Defendants are hereby awarded attorney's fees in the sum of $15,000, together with their costs as taxed.

DATED: This 28th day of January, 1982.

HARRY E. CLAIBORNE
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 82-4096
D.C. NO. 80-0582

DEPARTMENT OF EDUCATION,
State of Hawaii,

Plaintiff,

vs.

KATHERINE D., a minor, by & through her natural parents & legal guardians, KEVIN & ROBERTA D.,

Defendants-
Counterclaimants-
Appellees,

DEPARTMENT OF EDUCATION,
State of Hawaii, & DONNIS THOMPSON,
in her capacity as
Superintendent of Education,

Counterclaimants-
Defendants-
Appellants.

OPINION

Appeal from the
United States District Court
for the District of Hawaii

Hon. Harry E. Claiborne,
Chief U.S. District Judge, Presiding
Argued and Submitted October 21, 1982

Before: CANBY, NORRIS, and REINHARDT, Circuit Judges.

NORRIS, Circuit Judge:

The Department of Education of the State of Hawaii (DOE), appeals from a district court judgment holding it responsible for Katherine D.'s tuition at a private school. For the school years 1980-81 and 1981-82, Katherine had sought the "free appropriate public education" to which she was entitled under the Education for All Handicapped Children Act of 1975 (EAHCA or Act), 20 U.S.C. § 1401 et seq. (1976). The district court found that the DOE's offers of education for both years were inadequate under the Act and that, consequently, Katherine's parents were entitled to tuition reimbursement for the private school Katherine attended during that time. We affirm the district court's judgment as to the 1980-81 school year but reverse the 1981-82 component. We also

reverse the district court's award of attorneys' fees.

I

Facts

Katherine, who was born in 1976, suffers from cystic fibrosis and tracheomalacia, which cause her windpipes to be floppy instead of rigid. Since 1978, Katherine has worn a tracheostomy tube, which allows her to breathe and to expel mucus secretions from her lungs two or three times a day. She is unable to vocalize normally, but has received speech therapy and since February 1981 has been able to speak very softly.

In the summer of 1980, Katherine was certified by the DOE as eligible for special education services under the EAHCA. As required by the Act, the DOE offered an Individualized Educational Program (IEP) to Katherine prior to the beginning of the 1980-81 school year. Based on the rec-

ommendation of its physician, the DOE determined that the medical services Katherine might require could not be provided at a public school and therefore proposed a homebound program consisting of speech therapy and parent counseling. Katherine's parents rejected the IEP and initiated a due process hearing under the provisions of 20 U.S.C. § 1415(b)(2). During the course of that proceeding, Katherine continued to attend St. Philomena's Child Care Center, where she had been enrolled since 1979. Katherine's attendance at this private preschool was contingent on the presence of her mother. Mrs. D. was a teacher at St. Philomena's and thus was always available to provide for Katherine's health needs.

In October 1980 the administrative hearing officer decided that the DOE's offer of a homebound program did not constitute a "free appropriate public ed-

ucation" as required by section 1412(1) of the EAHCA because it did not provide for Katherine's placement in the "least restrictive environment" possible. [ER at 102] He concluded that Katherine should continue to attend St. Philomena's and ordered the DOE to pay for her tuition there. The DOE refused to follow the hearing officer's order and, in November 1980, filed a petition for review by the district court under 20 U.S.C. § 1415(e)(2). Katherine counterclaimed for enforcement of the hearing officer's order, attorneys' fees, and costs.

After the hearing officer had reached a decision, but before the trial in the district court, the DOE submitted an IEP for the 1981-82 school year to Katherine's parents. Under this IEP, the DOE proposed that Katherine attend Moanalua Elementary School and receive emergency health services, when needed,

through the school's staff. The IEP outlined a plan to train the staff to dispense Katherine's medication, suction her lungs, and reinsert her tube should it become dislodged. The first of two planned training sessions was conducted by Dr. Light, Katherine's physician, on September 9, 1981.

During this training session, Dr. Light formed the impression that the staff was reluctant to perform the necessary emergency health services for Katherine. He consequently recommended that Katherine not be sent to Moanalua.

A short time later, three unions representing Moanalua employees filed grievances with the DOE seeking clarification whether their contracts required them to perform health services for Katherine or similarly situated students. Those grievances had not been resolved by the time of trial.

The district court affirmed the findings of the hearing officer as to the 1980-81 school year and held that the DOE had not made an adequate offer for a "free appropriate public education" for either 1980-81 or 1981-82. The district court thus ordered the DOE to reimburse Katherine's parents for the cost of enrolling her in private school during both years,[1/] and granted attorneys' fees to appellees. The DOE appeals on all counts.

II

Did the DOE Offer Katherine a "Free Appropriate Public Education"?

The EAHCA "both funds and regulates state assistance to handicapped students." Mountain View-Los Altos Union High School Dist. v. Sharron B.H., 709 F.2d 28, 29 (9th Cir. 1983). Under section 1412(1) of the EAHCA, a state may qualify for federal assistance for special

education programs only if it "has in effect a policy that assures all handicapped children the right to a free appropriate public education." The term "free appropriate public education" is defined as special education plus such "related services" "as may be required to assist a handicapped child to benefit from special education." 20 U.S.C. § 1401 (17), (18). The term "related services" is further defined by regulation to include "school health services," i.e., "services provided by a qualified school nurse or other qualified person." 34 C.F.R. § 300.13(b)(10) (1982). Katherine's need both for speech therapy and for maintenance of her tracheostomy tube falls within these definitions. See Hymes v. Harnett County Board of Education, 664 F.2d 410 (4th Cir. 1981) (replacement of tracheostomy tube and suctioning of mucus assumed to be "related services" school

board was obligated to provide). Under section 1412(5)(B) of the Act, furthermore, participating states must establish "procedures to assure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped," and that handicapped children are not removed from the "regular educational environment" unless "the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . ."

These provisions set forth the DOE's obligations in offering Katherine a special education program under the EAHCA. Noticeably absent from the Act is any requirement that the DOE provide the best possible education for the eligible handicapped child. Because budgetary constraints limit resources that realistically can be committed to these special programs,

the DOE is required to make only those efforts to accommodate Katherine's needs that are "within reason." Tokarcik v. Forest Hills School Dist., 665 F.2d 443, 455 (3d Cir. 1981), cert denied, 192 S. Ct. 3508 (1982) (related services). As noted by the Supreme Court in its first interpretation of the terms of the EAHCA,

> furnishing handicapped children with only such services as are available to non-handicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go.

Board of Education v. Rowley, 102 S. Ct. 3034, 3047 (1982) (emphasis added) (holding that the EAHCA does not require the states "to maximize the potential of each handicapped child commensurate with the

opportunity provided nonhandicapped children"). The Court concluded

> that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Id. at 3048. See also Doe v. Anrig, 692 F.2d 800, 806 (1st Cir. 1982)(in determining appropriate placement of an individual handicapped child, the child's needs must be weighed against the realities of limited public monies).

We turn now to a consideration of the appropriateness of the IEP's the DOE offered to Katherine D.[2/] In determining whether the DOE's proposed programs met the statutory standard, we consider the two relevant school years separately because the programs offered in 1980-1981 and 1981-1982 were significantly dif-

ferent. We hold that the DOE's offer for 1980-81 was inadequate but that the 1981-82 plan offered Katherine a "free appropriate public education."

A. 1981-82 School Year[3/]

For the 1981-82 school year, the DOE offered to enroll Katherine in a regular public school program and to train the school staff to respond to her medical needs. The district court held that this offer did not satisfy the EAHCA's "free appropriate public education" requirement because

> the attitude of the school's personnel toward the plan made it completely unworkable and ineffectual [and] the plan self-destructed with the filing of the grievance by the school administrators and teachers involved.

Appellees agree with the district court's conclusion, arguing that the 1981-82 plan

was inadequate solely because school personnel were reluctant to administer the necessary emergency health services.

We do not agree with the district court that the 1981-82 IEP was so flawed that it failed to satisfy the statutory standard of a "free appropriate public education." The 1981-82 plan met the explicit requirements of the EAHCA and its implementing regulations.[4/] Katherine was to attend a regular public school and to receive emergency health services through the school's personnel when required. The district court's conclusion that staff reluctance made this plan unworkable is based upon only two pieces of evidence: first, the testimony by Katherine's physician that he overheard two unidentified teachers expressing hesitation about administering medical services to Katherine, and second, the grievance petition filed by three unions rep-

resenting teachers and principals. This evidence was insufficient to support the district court's conclusion that the DOE would not provide the health services Katherine required.[5/]

The grievance petitions sought clarification whether the services Katherine might require fell into the category of "medical services" that were outside the school staffs' contractual responsibilities. It is totally conjectural to assume from this, however, that the teachers would have refused to aid Katherine if ordered by their supervisors to perform the services pending final resolution of the grievance. Nor is there any evidence that the teachers were not competent to provide the care Katherine would have required. Finally, there is no evidence that the school board would not have arranged for special personnel to provide the emergency services

if the union ultimately prevailed in the contract dispute and the teachers were not required to comply with orders to attend to Katherine's needs.

In sum, the record before us contains insufficient evidence that Katherine would not have received emergency care when needed or that the DOE's proposed plan had "self-destructed." Taking that plan at face value and presuming, as we must in the absence of evidence to the contrary, that it would have been carried out competently and in good faith, we hold that the DOE offered Katherine a "free appropriate public education" for the 1981-82 school year.

B. 1980-81 School Year

For 1980-81, the DOE offered Katherine a homebound program consisting of one and one-half hours of speech therapy and forty minutes of parent counseling

per week. No academic instruction was offered. Nor was any effort made to ensure that Katherine would be educated in a school "with children who are not handicapped." 20 U.S.C. § 1412(5)(B). The DOE claimed in its own defense that Katherine's handicap was so severe "that education in regular classes with the use of supplementary aids and services [could not] be achieved satisfactorily." 20 U.S.C. § 1412(5)(B). The district court disagreed, and held that "the home treatment program offered by the DOE in this case does not satisfy the concept of the 'least restrictive environment' prescribed by the federal regulations." ER at 107.

We agree with the district court. Katherine was clearly capable of participating in regular classes with nonhandicapped children. She had attended St. Philomena's for a full year prior to requesting admission to public school. As

the DOE's proposal for the 1981-82 school year demonstrates, furthermore, services similar to those provided by Katherine's mother at St. Philomena's could have been made available in a public school setting without unduly burdening the school system. See supra p. _____. These services could have been provided by a "school nurse or other qualified person,"[6/] and thus fell squarely within the requirements of the Act. See 34 C.F.R. § 300.13(b)(10) (1982).

For these reasons, we hold that because the DOE did not make adequate efforts to place Katherine in a regular educational environment, the 1980-81 IEP did not offer her a "free appropriate public education" within the meaning of the Act.

III

Tuition Reimbursement for the 1980-81 School Year

The hearing officer ordered the DOE to reimburse Katherine for her private school tuition for the 1980-81 school year, acting under his "power to order any educational program for the child," 42 Fed. Reg. 42,476, 42,512 (1977), and, if necessary, to require placement in a private school at no cost to the parent. Id. at 42,510; S. Rep. No. 168, 94th Cong., 1st Sess., reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1426. The district court affirmed. The DOE challenges the district court's affirmance of the hearing officer's award on two grounds:[7/] first, that reimbursement of tuition for Katherine's attendance at a private school during 1980-81 pending resolution of a dispute over the IEP for that year is not an available remedy under the EAHCA; and second, that any money judgment against the DOE is barred by the eleventh amendment.

A. Statutory Remedies

The DOE here insists that appellees are not entitled to reimbursement for Katherine's private school tuition for the 1980-81 school year because the remedies available for violations of the EAHCA are limited to prospective relief.[8/] Appellees in turn contend that the language of section 1415(e)(2) of the Act, giving the reviewing court authority to grant "such relief as . . . is appropriate," supports the district court's retroactive award of the costs of Katherine's attendance at St. Philomena's during 1980-81.

The seminal case on the availability of reimbursement as a remedy under the EAHCA is Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981).[9/] There, the Seventh Circuit held that despite the broad language of section 1415(e)(2), the legislative history of the Act demon-

strates that the statute "was intended in most cases to provide only injunctive relief as a final procedural safeguard that would ensure an appropriate educational program for a handicapped child." Id. at 1210-11. Despite this general rule, the court recognized that damages might be recoverable in certain "exceptional circumstances," and cited illustratively two situations "in which a limited damage award might be appropriate": first, when the child's physical health would have been endangered had the parents not made alternative arrangements to those offered by the school system," and second, when the "defendant has acted in bad faith by failing to comply with the procedural provisions of [the Act]." Id. at 1213-14.[10/] The court believed these cases to be "exceptional" because

> [i]n those situations it is likely that Congress, though generally req-

> uiring that a child remain in his current placement, 20 U.S.C. § 615(e)(3), would have intended that parents take action to provide the necessary services for their children without awaiting the outcome of lengthy administrative and judicial proceedings. Parents should then be compensated for the costs of obtaining those services that the school district was required to provide.

Id. at 1213 (footnote omitted).

We recognize that Katherine's situation does not fit the precise facts of either of the illustrative exceptions mentioned in Anderson.[11/] Nonetheless, we believe that the DOE's behavior in this case was just as exceptional, and that this case therefore also involves "exceptional circumstances." We hold that an unexplained failure to offer a child placement in a classroom with his peers when the child has clearly demonstrated his ability to function in a classroom environ-

ment entitles the child to recover the cost of a private school education until an appropriate program is devised.

The congressional preference for educating handicapped children in classrooms with their peers is made unmistakably clear in section 1412(5)(B) of the Act, which provides that "to the maximum extent appropriate," handicapped children should be integrated into a regular educational environment. Although the statute does not require "mainstreaming" in every case, it is fundamental to the scheme and purpose of the Act that handicapped children be provided the same educational opportunity and exposure as those children who are not so disadvantaged. See, e.g., Tokarcik v. Forest Hills School Dist., 665 F.2d 443, 458 (3d Cir. 1981), cert. denied, 102 S. Ct. 3508 (1982) ("given the advantages of placement in as normal an environment as possible, to deny a handicapped

child access to a regular public school classroom without a compelling educational justification constitutes discrimination and a denial of statutory benefits"); Gladys J. v. Pearland Independent School Dist., 520 F. Supp. 869, 874 n.5 (S.D. Tex. 1981) ("[m]ainstreaming is clearly a predominant thesis underlying the EAHCA"). The DOE's own regulations recognize and implement this congressional preference:

> Hospitalized and home-bound care should be considered to be among the least advantageous educational arrangements [and are] to be utilized only when a more normalized process of education is unsuitable for a student who has severe health restrictions.

Department of Education, Program Standards and Guidelines for Special Education and Special Services, Programs and Services for the Orthopedically Handicapped and Other Health Impaired, paras. 27, 29, 30. We thus believe that this is also a case

where "Congress . . . would have intended that parents take action to provide the necessary services for their children." Anderson, 658 F.2d at 1213.

Consequently, we find no error in the district court's award of the cost of Katherine's private school tuition for the 1980-81 school year. Because the DOE failed to offer her a placement with her peers, notwithstanding her undisputed ability to function in a regular classroom environment, Katherine's continued attendance at St. Philomena's during the 1980-81 school year was the only feasible way her parents could assure her the benefits of the regular educational environment to which she was entitled.

Our holding is not inconsistent with those cases in which damages have been denied. As far as we can determine from often limited statements of fact, in no other case did a court consider a

situation in which a state education agency offered a homebound program to a child who was clearly capable of functioning in a classroom setting. In Mountain View-Los Altos Union High School Dist. v. Sharron B.H., 709 F.2d 28 (9th Cir. 1983), for instance, our court denied reimbursement for private school tuition because the procedure for assessing the child's health and education needs had not yet been completed. Id. at 30. In Anderson, the court refused to award damages when the parents of a handicapped child refused the placement in a public school classroom that was offered to her, and instead requested reimbursement of her tuition at a private school. 658 F.2d at 1207. Similarly, in Stemple v. Board of Education, 623 F.2d 893 (4th Cir. 1980), cert. denied, 450 U.S. 911 (1981), the court denied reimbursement to parents who unilaterally decided to transfer their handi-

capped child to a private school when they found her progress in the offered public school placement to be too slow. Because these cases did not involve "exceptional circumstances" to support an award of damages, they are distinguishable from Katherine D's situation.[12/] We thus hold that if education agencies fail to offer a classroom program to a handicapped child who has clearly demonstrated his ability to function in a normal classroom environment, leaving a private school placement as the only feasible means for satisfying the congressional preference that handicapped children be placed in the least restrictive environment, the state must pay the costs of that placement until an appropriate program is devised.

B. Eleventh Amendment Issue

The DOE also claims that the award of Katherine's school costs violates the eleventh amendment.[13/] We disagree.

Because the State of Hawaii chose to participate in a federally funded and regulated program to provide special educational programs for its handicapped children, we hold that it waived its eleventh amendment immunity against suit.

The Supreme Court has made clear that a state waives its eleventh amendment immunity by engaging in an activity regulated by Congress when Congress has constitutional authority to enact the regulatory statute, and that statute authorizes suits against the state. See e.g., Parden v. Terminal Ry. of Alabama State Docks Dept., 377 U.S. 184 (1964). In Parden, the Court held that "Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the [Federal Employers' Liability Act]," id. at 192, and that "[the state], when it began operation of an interstate railroad . . .

necessarily consented to such suit as was authorized by that Act." Id. at 192.

Because, however, the states have "long enjoyed" the protection of the eleventh amendment, Employees v. Department of Public Health & Welfare of Missouri, 411 U.S. 279, 285 (1973), the Court has said that it

> will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

Edelman v. Jordan, 415 U.S. 651, 673, reh. denied, 416 U.S. 1000 (1974) (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909). Accordingly, the Ninth Circuit has indicated that eleventh amendment immunity will be waived

> when [1] Congress has authorized suit against a class of defendants that includes states, and [2] the state enters into the activity regulated by federal law.

Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1283 (9th Cir. 1979) (Copyright Act).

We find that both prongs of the Mills Music test are satisfied in the instant case. Here, Congress conditioned the right to receive funds under the EAHCA on the state's amenability to suit in federal court. Section 1415(e)(2) provides that

> [a]ny party aggrieved by the findings and decisions made under subsection (b) [providing for administrative review] . . . shall have the right to bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States . . .

Since, inevitably, one of the parties to any EAHCA dispute will be a state agency, see 20 U.S.C. § 1412, this authorization clearly extends to suits against states. We therefore hold that the DOE consented

to suit when it applied for and received federal funds under 20 U.S.C. § 1412. The State of Hawaii waived its eleventh amendment immunity and was amenable to suit by Katherine in federal court under the EAHCA.[14/]

IV

Attorneys' Fees

Finally, we reverse the district court's award of attorneys' fees to appellees. While we recognize that the availability of attorneys' fees may be essential to enable many of the handicapped to avail themselves of statutory safeguards enacted for their benefit, we hold that appellees may not recover their fees under either of the statutes on which they rely: the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988 (1976), or the Rehabilitation Act of 1973, 29 U.S.C. § 794a(b) (Supp. III 1979).

A. 42 U.S.C. § 1988

The Civil Rights Attorneys' Fees Award Act, 42 U.S.C. § 1988, provides for an award of attorneys' fees only to those parties who prevail "in any action or proceeding to enforce a provision of section . . . 1983 . . . of this title."[15/] We hold that appellees cannot recover under this provision because they cannot state a claim under 42 U.S.C. § 1983.

The Supreme Court has consistently indicated that the benefits of an action under 42 U.S.C. § 1983 are unavailable "where the governing statute provides an exclusive remedy for violation of its terms." Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 28 (1981) (citing Maine v. Thiboutot, 448 U.S. 1, 22 n.1 (1980) (Powell, J., dissenting)). Where Congress has provided a comprehensive enforcement and remedial scheme in enacting a regulatory statute, the Supreme

Court has held, we must read the statute "to supplant any remedy that would otherwise be available under § 1983." Middlesex County Sewerage Authority v. National Sea Clammers Assoc., 453 U.S. 1, 21 (1981).

We hold that the complex provisions of section 14 of the EAHCA, which establish detailed procedures for administrative and judicial review of the state's proposals to educate handicapped children, create a comprehensive and exclusive remedial scheme that precludes reliance upon a cause of action under section 1983. The Act evinces the "balance, completeness, and structural integrity" the Supreme Court has looked to in finding that a statute creates an exclusive remedial scheme. Brown v. GSA, 425 U.S. 820, 832 (1976). See also Smith v. Cumberland School Committee, 703 F.2d 4, 8, cert. granted, 52 U.S.L.W. ____ (U.S. Oct. 31,

1983) (No. 82-2120); Anderson v. Thompson, 658 F.2d 1205, 1216 (7th Cir. 1981) ("The EAHCA . . . contains an elaborate administrative and judicial enforcement system."). Moreover, because money damages are not recoverable under the EAHCA absent exceptional circumstances, the remedies authorized by the two statutes are inconsistent. That is a strong indication that Congress did not intend to leave the section 1983 remedies available. See Adickes v. Kress & Co., 398 U.S. 144, 150-51 n.5 (1970); Anderson, 658 F.2d at 1216-17. Consequently, appellees may not assert the section 1983 claim necessary to support a fees award under section 1988.[16]

B. 29 U.S.C. § 794a(b)

We apply a similar analysis to find that appellees can assert no claim under the Rehabilitation Act of 1973, 29 U.S.C. § 794a(b), and thus cannot

recover their attorneys' fees by reliance on its provisions. The statute provides in relevant part that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in . . . any program . . . receiving Federal financial assistance." Arguably, Katherine might have recovered under this provision had Congress not enacted the EAHCA to provide special education and health services for handicapped children. In the face of the comprehensive remedial provisions of the EAHCA, however, we must conclude that Congress foreclosed persons complaining of conduct protected by the EAHCA from asserting claims under the Rehabilitation Act. As noted above, the EAHCA establishes detailed procedures for administrative review of states' proposals for educating handicapped children. If aggrieved parties could gain direct access to the

courts merely by asserting claims under the Rehabilitation Act, the EAHCA's administrative review requirements could easily be circumvented. As in Brown v. GSA, 425 U.S. 820, 833 (1976), Congress' "careful blend of administrative and judicial enforcement powers" compels a conclusion that other remedies are precluded. The Rehabilitation Act cannot be used to create an "end run" around the restrictions of the EAHCA and to gain remedies that would otherwise be unavailable. Reineman v. Valley View Comm. School Dist., 527 F. Supp. 661, 665 (N.D. Ill. 1981), ("[plaintiffs could not recover damages under the Rehabilitation Act because they] cannot do indirectly via [the Rehabilitation Act] what Anderson teaches may not be done directly"); see also Hines v. Pitt County Board of Education, 497 F. Supp. 403 (E.D.N.C. 1980) (although plaintiff included cause of

action under Rehabilitation Act, attorneys' fees under 29 U.S.C. § 794a(b) held unavailable because suit had been treated as arising under EAHCA throughout litigation).[17/] Prohibiting reliance on the Rehabilitation Act in this case also accords with the long-established principle of statutory construction that "a precisely drawn, detailed statute pre-empts more general remedies." Brown v. GSA, 425 U.S. at 834. We thus hold that Katherine cannot recover attorneys' fees under section 794a(b) of the Rehabilitation Act.

In sum, we hold that Katherine prevailed in this litigation solely on the basis of her rights under the EAHCA, and that the comprehensive remedial provisions of that statute prevent her from recovering attorneys' fees under either 42 U.S.C. § 1983 or the Rehabilitation Act, 29 U.S.C. § 794a(b).

AFFIRMED in part and REVERSED in part.

FOOTNOTES

1. The district judge did not make clear whether he intended to extend his order of reimbursement to cover both the 1980-81 and the 1981-82 school years. Because we hold that the DOE's 1981-82 IEP offered a "free appropriate public education," we need not reach the question whether an award of Katherine's school costs for that year would have been justified.

2. We apply a de novo standard of review to the questions whether the DOE's IEPs constituted a "free appropriate public education" within the meaning of the EAHCA and whether the Act provides for an award of damages and attorneys' fees. Because those determinations require us to weigh the values underlying the statute in deciding the legal sufficiency of the

DOE's offers -- we must, for instance, determine the weight to be assigned the explicit congressional preference that handicapped children be educated in classrooms with their peers, see infra p.____ California Health and Welfare Agency, 704 F.2d 1465, 1468-69 (9th Cir. 1983) (whether state was "employer" within meaning of Fair Labor Standards Act treated as question of law).

3. Although the administrative hearing officer was never asked to consider whether the DOE's IEP for the 1981-82 school year constituted a "free appropriate public education," we hold that it was proper for the district judge to decide that question when the case came before him. Because Congress "intended the courts to make independent program decisions based on a pre-

ponderance of the evidence," Anderson v. Thompson, 658 F.2d 1205, 1208 (7th Cir. 1981) (affirming district court's consideration of plaintiff's then current educational requirements despite absence of prior administrative findings); see 20 U.S.C. § 1415(e)(2), the district court in this case was not hampered by the absence of administrative findings on Katherine's educational or health needs. See also Doe v. Anrig, 692 F.2d 800, 805 (1st Cir. 1982) ("the review mechanism which the Act creates stands in sharp contrast to the usual situation where a court is confined to examining the record made before the agency"). Nor are the necessary findings so technical or specialized that the trial judge is less competent than the administrative hearing officer to make them de novo. As a matter of judicial efficiency,

furthermore, it was sensible for the trial judge to consider the DOE's offers for both school years at the same time.

4. The question whether the 1981-82 offer satisfied the statutory requirements is judged by an absolute, not a comparative, standard. As noted in text, supra p. ____, Katherine was entitled only to an appropriate, not to the best, education at public expense. It is thus irrelevant to our determination whether a placement at St. Philomena's would have been superior to a public school placement in 1981-82. Thus, the fortuitous circumstance of Mrs. D's presence at St. Philomena's is not a factor that we can consider in evaluating the DOE's 1981-82 proposal.

5. We apply the clearly erroneous standard of review to test the district court's factual finding that the school staff was unwilling to perform the required emergency health services for Katherine. As indicated in text, we do not accept this factual finding, even under the deferential standard of review we apply to it.

6. It is indisputable that even a lay person could have been trained to provide the services Katherine required. Indeed, Katherine's mother, who had had no medical training, had performed them for some time.

7. The DOE also contends that appellees do not have standing to ask the court to award them the cost of Katherine's private schooling because, since the hearing officer decided in their

favor, they are not "aggrieved parties" within the meaning of section 1415(e)(2). We reject this contention. Although the DOE relies on Colin K. v. Schmidt, 3 EHLR 553:506 (D.R.I. 1981), and Scruggs v. Campbell, 630 F.2d 237 (4th Cir. 1980), to support its claim, both of these cases are distinguishable. Colin K. held only that a parent was no longer an "aggrieved party" when the state education agency agreed to satisfy the parent's claims after suit in federal court had begun. The court in Scruggs held that a plaintiff could not request review of an administrative determination under the Act simultaneously in both federal and state forums. Neither speaks to the facts of this case, in which the DOE to date has refused to enforce the hearing officer's order and in fact

initiated this suit itself. In responding to the DOE's action with a counterclaim, appellees thus had standing to press enforcement of the hearing officer's decision.

8. The DOE contends only that the retroactive award of Katherine's tuition for the period pending resolution of the dispute over the IEP is impermissible under the EAHCA. As to any prospective relief, the statute provides that a state education agency must pay the costs of private schooling concurrently with the child's enrollment if the agency or a hearing officer determines that a private school program is the appropriate placement to meet EAHCA requirements. See 20 U.S.C. § 1413(a)(4)(B).

9. In Mountain View-Los Altos Union High School Dist. v. Sharron B.H., 709 F.2d 28 (9th Cir. 1982), we relied upon Anderson as an "extensive and well reasoned opinion," id. at 30, to support our conclusion that damages were inappropriate when the administrative assessment procedure preparatory to offering a placement for a handicapped child had not yet been completed. Anderson has also been cited with approval by other circuits. See, e.g., Doe v. Anrig, 692 F.2d 800, 812 (1st Cir. 1982); Miener v. Missouri, 673 F.2d 969, 979 (8th Cir.), cert. denied, 103 S. Ct. 215 (1982).

10. These "exceptional circumstances" are best described in the cases in which they were first held to exist. In Tatro v. Texas, 516 F. Supp. 968 (N.D.

Tex. 1981), cited by the Anderson court to illustrate the first of its exceptions to the general rule, the court ordered reimbursement of private school tuition when the school district's offer to enroll a handicapped child in a public school program did not make provision for the "related health services" the district knew the child would need in order to attend. The court there indicated that "where . . . the parents cannot enroll the child [in the offered placement] without a risk of injury to the child because a school will not provide a required related service [there, regular catheterization], appropriate relief ought to include the cost of alternative sources of education and therapy." Id. at 978. In Monahan v. Nebraska, 491 F. Supp. 1074 (D. Neb. 1980), the case used in Anderson to

illustrate the bad faith exception to the general rule, the court held that an award of the interim costs of private schooling was "appropriate" relief where state's statutory procedures for review of placement offers did not comply with the requirements of the EAHCA. Also pointing to an administrative failure to follow prescribed procedures, the court in Christopher T. v. San Francisco Unified School Dist., 553 F. Supp. 1107, 1121 (N.D. Cal. 1982), awarded plaintiffs reimbursement for residential placement of their child when the state education agency wilfully avoided taking responsibility for his education. Similarly, the court in Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104 (N.D. Cal. 1979), awarded plaintiffs the cost of a home tutor for their autistic child after

the local school district refused to follow the recommendation of every other state agency consulted that individualized supervision for the child be provided.

11. Unlike the plaintiff in Tatro, Katherine was not physically incapable of accepting the DOE's offer for the 1980-81 school year. The DOE failed to provide her not with essential health services but rather with an adequate educational program in a classroom with her peers. See infra p. ___. Nor is the DOE guilty of the kind of procedural bad faith implicitly recognized as a basis for an award of damages in Monahan, Christopher T. and Boxall: the DOE was following the procedural safeguards of the EAHCA in pursuing administrative

and judical review of its placement offer.

12. In Doe v. Anrig, 692 F.2d 800 (1st Cir. 1982), on the other hand, the court refused to grant reimbursement under the EAHCA despite arguably exceptional circumstances. In that case, the state education agency offered a handicapped child a nonresidential program at a public school. The parents rejected the plan and continued to pay tuition at a private school, believing that their child needed the supervision of a fulltime residential placement. The district court determined that a residential program was in fact appropriate, and awarded reimbursement for the private school tuition. Although the court of appeals affirmed the district court on the appropriateness of the private

school placement, it denied damages under the EAHCA, leaving open the possibility that the child's private school costs could be recovered under state law. Although the facts of Doe v. Anrig are thus arguably similar to those in Tatro -- the state agency offered the child integration into a regular educational environment of which he could not take advantage -- the opinion does not make clear whether the handicapped child was physically incapable of attending the nonresidential program suggested for him. If he was not incapable, the facts of the case are comparable to those in Stemple, in which damages were denied as compensation for the parents' unilateral choice of a private school education when there was no medical necessity for removing

their child from her public school placement.

13. The eleventh amendment is not by its terms applicable to suits brought against a state by its own citizens. Nonetheless, "it is established that an unconsenting State is immuned from suits brought in federal courts by her own citizens as well as by citizens of another States." Employees v. Department of Public Health and Welfare, 411 U.S. 279, 280 (1973) (citations omitted).

14. Because we find that the DOE waived its eleventh amendment by consenting to the terms of the EAHCA, we do not reach the appellees' contentions that that immunity could also have been waived by the DOE's initiation of this suit, by the state's passage of its

own tort claims act, or by Congress' authority to abrogate eleventh amendment immunity if it passes legislation under § 5 of the fourteenth amendment.

15. The parties do not claim that any of the other statutory provisions to which 42 U.S.C. § 1988 is applicable is implicated in this case.

16. Nor can Katherine assert a viable cause of action under § 1983 by relying on a claim that her right to equal protection was violated by the DOE's failure to offer her an adequate educational program. It is clear that where adequate alternative remedies remain available Congress may abrogate a statutory means for the enforcement of constitutional rights. The comprehensive nature of the remedies laid out in the EAHCA evinces a congres-

sional intent to preclude reliance on either a statutory or a constitutional cause of action under § 1983. It is arguable that where adequate alternative remedies for the vindication of constitutional rights are unavailable, Congress may not abrogate existing statutory means of enforcement. See Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953). Cf. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (despite absence of statutory authorization, money damages available to compensate victims of fourth amendment violations). Appellees do not argue, however, that the EAHCA remedies are constitutionally inadequate. Thus, we do not reach the question.

17. Some district courts have held that attorneys' fees under the Rehabilitation Act will be available even in cases in which the prevailing party has relied primarily on the EAHCA to support his substantive claims. See, e.g., Patsel v. District of Columbia Board of Education, 3 EHLR 553:495 (D.D.C. 1982); Campbell v. Talladega County Board of Education, 518 F. Supp. 47 (N.D. Ala. 1981); Tatro v. Texas, 516 F. Supp. 968 (N.D. Tex. 1981). For the reasons given in the text, we cannot accept those courts' holdings. See supra p. ____.

DEPARTMENT OF EDUCATION V. KATHERINE D., NO. 824096

REINHARDT, Circuit Judge, concurring in part and dissenting in part:

I dissent from the majority's rejection of the district court's finding that the Department of Education failed to offer Katherine a free appropriate public education for the 1981-82 school year. I cannot agree that the district court's finding in this regard was clearly erroneous. I concur in all other parts of Judge Norris's opinion.

The majority does not state clearly what it believes Katherine was required to show in the district court. Parts of the opinion indicate that reluctance on the part of the school's staff would be enough to render the school's plan unworkable, yet other parts suggest that only a show-

ing of positive refusal to perform the required services would suffice.

I believe that under the circumstances the staff's reluctance to perform the required services rendered the plan inadequate for purposes of the EAHCA. Katherine's physician testified that delay by the school staff in performing the emergency services would have been life-threatening to Katherine and that a cooperative attitude on the part of the teachers was essential to the effectiveness of the emergency plan. The district court credited the physician's testimony with regard to these factual issues; we are not free to disregard it here. A plan involving such a risk to a child's life cannot be considered adequate.

The filing of a grievance petition by the teachers' union and the conversations

overheard by the physician support a finding that at least part of the school's staff was reluctant to perform the services and justify an inference that there might have been hesitation or delay at the crucial moment. The district court's holding that the attitude of the school's personnel rendered the plan inadequate was therefore not clearly erroneous.

Moreover, Katherine's parents were not required to show conclusively that the teachers would have refused to perform the emergency services when necessary. The Act certainly does not require parents to risk their child's life pending a conclusive showing that essential services would not be provided. In life-and-death situations such as the one involved here, a reasonable doubt whether the services would be provided is enough to justify

parents in refusing to enroll their children in a school.

The evidence presented here may reasonably have led Katherine's parents to doubt whether the school's staff would have provided the services when they were needed. Katherine's physician, who was responsible for training the teachers in the emergency procedures and who conducted an introductory training session, testified that the teachers were unwilling to perform the required services. His testimony was buttressed by the teacher's union's filing of a grievance petition. Although that evidence does not compel a conclusion that the teachers would have refused to perform the services if put to the test, it is certainly sufficient to raise a reasonable doubt in one's mind on that point.

In short, the district court's finding that the staff's attitude rendered the plan inadequate was not clearly erroneous. Accordingly, I would affirm the district court's conclusion that the Department of Education did not offer Katherine a free appropriate public education for the second year. Because the Department's prior EAHCA violation was not cured by the school's offer of the second plan, I would affirm the district court's award of damages for both years in accordance with our holding that, when exceptional circumstances are involved, the state must pay the cost of private school placement until an appropriate program is devised.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 82-4096

DEPARTMENT OF EDUCATION,
STATE OF HAWAII,

Plaintiff,

vs.

KATHERINE D., a minor, by and through her natural parents and legal guardians, Kevin and Roberta D.,

Defendants-
Counterclaimants-
Appellees,

DEPARTMENT OF EDUCATION,
STATE OF HAWAII, and Donnis Thompson,
in her capacity as
Superintendent of Education,

Counterclaimants-
Defendants-
Appellants.

ORDER

Before: CANBY, NORRIS, and REINHARDT, Circuit Judges.

The petition for rehearing is DENIED.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

KATHERINE D., a minor, by and through her natural parents and legal guardians, Kevin and Roberta D.,

Petitioner

v.

DEPARTMENT OF EDUCATION, State of Hawaii,

Respondent.

PROOF OF MAILING--AFFIDAVIT

I, JAMES T. PAUL, one of the attorneys for Katherine D., a minor, by and through her natural parents and legal guardians, Kevin and Roberta D., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby

certify that, on the 27th day of March, 1985, I deposited in the United States post office located at Honolulu, Hawaii, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JAMES T. PAUL

Subscribed and sworn to before me, at Honolulu, Hawaii, this 27th day of March, 1985.

Notary Public, State of Hawaii

My commission expires on November 4, 1988

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

KATHERINE D., a minor, by and through her natural parents and legal guardians, Kevin and Roberta D.,

Petitioner

v.

DEPARTMENT OF EDUCATION, State of Hawaii,

Respondent.

PROOF OF SERVICE--AFFIDAVIT

I, Kyoko Patoc, secretary to Paul Alston, one of the attorneys of record for Katherine D., a minor, by and through her natural parents and legal guardians, Kevin and Roberta D., Petitioner herein, depose and say that on the 27th day of March,

1985, I served a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on Department of Education, State of Hawaii, Respondent herein, by mailing the same, with first-class postage prepaid, and properly addressed to Charleen M. Aina, Deputy Attorney General, counsel of record for said Respondents, located at the State Capitol, 415 South Beretania Street, Room 405, Honolulu, Hawaii 96813.

Kyoko Patoc

KYOKO PATOC

Subscribed and sworn to before me, at Honolulu, Hawaii, this 27th day of March, 1985.

Notary Public,
State of Hawaii

My commission expires on November 4, 1988